NATIONAL TRUST FOR HISTORIC PRESERVATION®

October 22, 2009

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Regional Administrator
Federal Transit Administration, Region IX
201 Mission St., Suite 1650
San Francisco, CA 94105

Wayne Yoshioka, Director
Department of Transportation Services
City and County of Honolulu
650 South King St.
Honolulu, Hawaii 96813

Re: Comments on Draft Programmatic Agreement (PA) for Honolulu High-Capacity Transit Corridor Project

Dear Mr. Rogers and Mr. Yoshioka:

The National Trust for Historic Preservation submits the following comments on the Draft Programmatic Agreement (PA) for the Honolulu High-Capacity Transit Corridor Project.

Failure to Identify Native Hawaiian Burials Prior to Selecting Alternatives Violates Section 4(f).

We remain extremely concerned by the City's decision to defer detailed identification of historic properties within the Phase 4 alignment, which is the section that has a known high concentration of unmarked Native Hawaiian burials. We have reviewed the letter from the O'ahu Island Burial Council (OIBC), which has unanimously opposed the decision to defer an Archaeological Inventory Survey (AIS) Plan. In our view, the City's decision renders the project legally vulnerable under Section 4(f) of the Department of Transportation Act, pursuant to *Corridor H Alternatives, Inc. v. Slater*, 166 F.3d 368 (D.C. Cir. 1999). The City has already stated publicly that it expects a final decision approving the transit project will be challenged in court. In light of this prediction, it is surprising that the City would not act to reduce this legal vulnerability by completing the AIS prior to making a final decision on the project. We urge the Federal Transit Administration (FTA) to consider this issue in the context of its own legal sufficiency review for this project.

The *Corridor H* case, like this one, involved a long, linear transportation project that was the subject of a Programmatic Agreement (PA) under Section 106 of the National Historic Preservation Act. The PA deferred the identification of certain historic properties to the future. Although the PA was adequate for purposes of compliance with Section 106, the court found it was not adequate to comply with Section 4(f). In *Corridor H*, the historic resources at stake were large rural historic landscapes and battlefields, which could not be avoided without going outside the alignment that had been studied for the project. As a result, the agency could not document that it had made a meaningful evaluation of whether the project would

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require the "use" of historic properties under Section 4(f), unless and until it had sufficient information on whether historic properties existed within the corridor.[1]

Deferring the identification of historic properties may be acceptable where the nature and scope of the resources would allow them to be easily avoided, as in the case of archaeological sites that are only significant under National Register Criterion D. However, resources such as traditional cultural properties (TCPs) and Native Hawaiian burials require an entirely different approach, because they have in-place significance, and the project may not be able to avoid harm to these resources without selecting a different alternative.[2] If a determination of National Register eligibility would influence the agency's selection of alternatives under Section 4(f) (and Section 106 and NEPA as well), then the identification of those historic properties, and the project's potential effects on them, must be evaluated at a time when they can actually inform the selection of alternatives, rather than being deferred to a later date after alternatives have been foreclosed.

The assurances in the PA that consultation regarding TCPs will be completed "prior to commencement of construction" (PA, II.B.) are not adequate, in our view, to ensure that avoidance alternatives have not been foreclosed. The City seems to assume that adverse effects to burials can be avoided because alterations -- such as relocating guideway columns, using straddle-bent supports, or modifying span length -- should allow most burials to be preserved in place. (PA, III.E.2.b.). However, the OIBC rightly disagrees. The City cannot conclude with certainty that it will avoid burial sites.

The Draft PA Does Not Adequately Address the Foreseeable Indirect and Cumulative Effects of the Project.

Historic Hawaii Foundation and the National Trust have both expressed concern that, without local land use regulation that includes historic preservation,[3] the transit project Is likely to generate nearby development that could harm or destroy historic

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[1] In fact, a large rural historic district *was* later determined eligible for the National Register, which required a major reroute of the proposed highway.

[2] *See* National Register Bulletin #38: Guidelines for Evaluating and Documenting Traditional Cultural Properties, which defines a TCP as "one that is eligible for inclusion in the National Register because of its association with cultural practices or beliefs of a living community that (a) are rooted in that community's history, and (b) are important in maintaining the continuing cultural identity of the community."

[3] We recognize that the Transit Oriented Development (TOD) ordinance calls for the development of regulations that include "controls to protect and enhance" historic, scenic, and cultural resources. Ordinance 09-4, § 21-9.100-4(f). However, until those regulations are developed, we have no assurance as to how effective they may be in protecting historic properties from demolition or incompatible alteration.

properties. These are reasonably foreseeable indirect and cumulative effects, which must be taken into account under Section 106. (36 C.F.R. § 800.5(a)(1); 40 C.F.R. § 1508.8(b).) We proposed specific language for a stipulation that would not only monitor such adverse effects on historic properties, but would also spell out consequences if the level of such adverse effects rises too high in the future.

The City's proposed stipulation (IX.C.) is simply not adequate. It requires nothing more than the City providing a list every six months of demolition permits already granted for historic properties within the APE. Even if every historic property were demolished, no mitigation would be required – only after-the-fact reporting. Without some consequences imposed for demolitions, transit-oriented development could have profound impacts to historic properties in Honolulu.

We reiterate our request to develop a mitigation measure that will provide:
(1) a timely way for these indirect and cumulative effects to be monitored; and
(2) meaningful consequences if the effects turn out to be significant. Our previous proposal was to adopt a moratorium if demolitions began to rise substantially (using the Washington Convention Center MOA as a model), as a way of "avoiding" and "minimizing" adverse effects. However, another approach could be to increase funding to the Historic Preservation Committee (HPC) – for example, by adding $100,000 for each demolition or incompatible alteration that is approved by the City within the APE or in development areas surrounding transit stations -- as a way of "mitigating" the adverse effects. As a third alternative, demolitions could trigger a consultation process that would develop specific mitigation to include strengthened local land use regulations or other programs to enhance historic resource protection.

We would also like to ensure that this stipulation includes:

- Notice of permits for major alterations in addition to demolition, as requested in our original proposal;
- Notice of permit applications at the time they are filed, and not just after they have already been granted; and
- The area subject to monitoring should include the full 2,000-foot radius around stations.

<u>The PA Should Not Restrict Subsequent Consultation to "Concurring" Parties</u>.

In many places throughout the PA, there is an opportunity for subsequent input to some degree by stakeholders as specific plans or mitigation measures are developed. Unfortunately, however, the PA in many places restricts the opportunity for comment exclusively to those consulting parties that are willing to formally "concur" in the PA. We recognize that this approach is often used as a way to encourage parties to concur in Section 106 agreements, by offering extra "benefits" for concurring parties. However, we believe this restriction is inappropriate here. The primary stakeholders

that are likely to be excluded by this restriction are Native Hawaiian organizations that may be unwilling to concur in the PA. For example, the OIBC voted unanimously not to concur, as a matter of conscience.

The following mitigation measures in the Draft PA are subject to the restriction that only "concurring parties" can review and comment, or otherwise participate:

- Review of Preliminary Engineering Design Plans (IV.C.)
- Scope of work for Historic Context Studies (V.A.)
- Scope of work for Cultural Landscape Reports (V.B.)
- Kick-off meeting for Interpretive Plan (VII.A.1.)**
- Kick-off meeting for historical brochure (VII.B.1.)**
- Review of materials for children (VII.C.2.)
- Kick-off meeting for Humanities Program (VII.D.)**
- Kick-off meeting for educational program to encourage rehabilitation (VII.E.)**
- Coordination with Project Architectural Historian (IX.A.1.)
- Participation in Annual informational meeting (XIII.C.3.)

** Four of these stipulations do allow input from all consulting parties, but only *after* an initial opportunity for comments and/or a special "kick-off" meeting that is limited to concurring parties only. This highlights the "second-class" status to which conscientious objectors such as the OIBC would be relegated.

Many of these mitigation measures involve the preparation of plans or studies or interpretive materials that would especially benefit from active involvement at every step by Native Hawaiian organizations. In our view, it would be wrong to force the consulting parties to have to choose between meaningful involvement in developing mitigation measures and a principled decision not to "endorse" the PA.

Specific Comments

We also support the comments submitted by the National Park Service and Historic Hawaii Foundation. We would especially like to reiterate the following:

- We share the concerns raised by the Park Service that premature issuance of the RFP may have unlawfully "restrict[ed] the subsequent consideration of alternatives to avoid, minimize or mitigate the [project's] adverse effects on historic properties" under Section 106. 36 C.F.R. § 800.1(c). We urge the FTA to consider this issue in connection with its legal sufficiency review, and to incorporate safeguards to address it.

- We agree with both the Park Service and HHF that the requirement for consistency with the *Secretary of the Interior's Standards for the Treatment of Historic Properties* should not be limited to project elements "within the boundary" of a historic property (IV.A.), but should also include project elements that are adjacent to historic properties.

- We also agree with HHF that additional mitigation should be provided if the design review process does not result in a design that is consistent with the *Secretary of the Interior's Standards for the Treatment of Historic Properties* (IV.C.). This is especially important for the anticipated impacts to the Dillingham Transportation Building and courtyard.

In addition, we recommend the following minor revisions for clarification:

- At the end of Stipulation VII.D.3. (p.15), add "whichever occurs later."

- In Stipulation VIII.D.4. (p.17), change "parks improvements" to "implementation of the park improvement plan."

Finally, we reiterate our prior comment to add the following provision to Stipulation VI.B., regarding the update to the National Historic Landmark (NHL) nomination for Pearl Harbor:

> The work shall be carried out and approved by persons meeting the professional qualifications for Historical Architect or Architectural Historian in *The Secretary of the Interior's Historic Preservation Professional Qualification Standards*, 62 Fed. Reg. 33,713-14, 33,719-20 (June 20, 1997).

This higher professional qualification requirement would apply if the Navy were the agency commissioning the NHL update. The City and FTA should be required to meet the same standard.

Thank you again for the opportunity to comment on the Draft PA.

Sincerely,

Elizabeth Merritt

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